Supreme Court of the United States.

ANTONIO ARCADI
v.
THE STATE OF ALABAMA. } No. 306.

ON MOTION TO DISMISS.

Brief of P. PHILLIPS.

Arcadi was indicted in Dallas County, under a statute of the State, for keeping a gambling table. He was found guilty by the jury, and a fine of $500, was assessed against him. p. 9.

The case was taken by bill of exceptions, to the Supreme Court of the State, from which it appears that evidence was introduced tending to show that in said County, the defendant kept and exhibited a gambling table, "similar in many respects to a table, commonly known as a roulette table, at which money was bet by persons operating at said table; that the money was bet in this manner, viz: the person who wished to bet on said table, would pass to the game-keeper money, for which he would receive in return checks of bone or ivory, of the same kind used in betting at the game of faro; that then the checks would stand for and represent money, and when handed in to the game-keeper by the

player, would be deemed as money at the value at which they were passed out by him; that the betting was carried on in this wise: a large table was placed in front of the game-keeper, upon which was a piece of oil cloth, upon which was painted or printed certain numbers from 1 to 31, also columns on which said numbers were painted or printed, said numbers were in alternate colors of black and red, below the green column hereafter described. On the table was a wheel, the same as is used in the game of roulette; on this wheel were painted colors and numbers exactly corresponding with the colors and numbers on the oil cloth; a ball or marble was placed in this wheel, and the wheel was started by the game-keeper to revolve on its pivot, and the ball or marble was started at the same time. The bet was determined when the wheel stopped, and the ball falls into some one of the numbers and in one of the columns of red or black. If the ball falls on a color bet on, the player wins; if not, the game-keeper wins. If the ball falls on a single number, bet on, the player wins 27 for one bet, or, in the checks used as a substitute for money. There is above these columns of red and black, a green colored column in which are painted the numbers 31, 30, and 29. The other numbers are in red and black, the only difference between the wheel and a roulette wheel, is, that on the latter, instead of No. 31, is an O; in place of 30, a picture of an eagle; and in place of 29, is O O. That in this manner, persons were betting at said table in the City of Selma, and won and lost money at the same."

The defendant, justified, by offering evidence to show that in carrying on this, he was acting as the agent of Moses and Co., who had a lottery grant under the act of the legislature, approved, 31 December, 1868, and that

Moses & Co. had paid the several annual sums required by that act.

He further offered to show, that after the passage of the repealing act, of the 18 March, 1871, he had consulted counsel as to its validity, and that they advised that the said repealing act was unconstitutional. This evidence was rejected by the court.

The charges asked and refused, will be found at p. 12. The only one, material, to be noticed is, that which requested the court to charge, that if jury found that Moses & Co., had paid certain annual instalments as required by the act of 1868—" no act of the legislature, passed after such acceptance and payment, purporting to repeal said first act, is constitutional or valid, but is void, and of no force.

The case was argued and submitted to the Supreme Court at the June Term, 1872. There is no assignment of error in that court. The judgment of the Circuit Court was affirmed on the authority of Mayor, &c., of Mobile v. Moses & Co., delivered at same term, (p. 14.)

A writ of error under the 25 section of the judiciary act, was applied for and refused by the Chief Justice of the State Court; it was subsequently granted by one of the justices of this court, (p. 15.)

The act of 1868, is to be found in pamphlet acts, p. (.) As the present case was decided on the authority of the case of Moses & Co., it will be necessary to refer to the opinions of the judges, delivered in that case, to ascertain whether any federal question has been so decided as to give this court jurisdiction to reverse the present judgment.

These opinions will be found in the printed record of

J. Clifton Moses, and Eugene Beebe v. Mayor & Aldermen of the City of Mobile, No. 529, in which, at the last term, the court ordered the dismissal of the writ of error, (15 Wall, 389.) For the convenience of the court, I give an abstract of these opinions.

Saffold J., held, that under the constitution of the State, the legislature had no authority to pass the act of 1868, and secondly, "if valid it requires the distribution of prizes to be fairly made, which is not the case in the games called Keno and Roulette.

(*Peck*, C. J., concurred "in the opinion as to the unconstitutionality of the act.)

Peters, J., after citing the act, held, that it was a grant of a "privilege, or franchise," for the consideration therein stated, which the legislature was competent to make, and that it was irrepealable. "There is one other question, (says the judge,) that remains to be considered, it is this.—Does the statute of 1868 authorize Moses & Co. to do the "business" for which they claim protection? If it does, then I think they have shown sufficient ground to invoke the aid of the court to protect them in the further continuance of the same, until they make default in the payment of the annual sums required by the act. Then, what is the "business" the "association" are entitled to pursue under the act?

The act declares that the "association" was allowed to be formed "for the purpose of receiving subscriptions, and to sell and dispose of certificates of subscription, which shall entitle the holder thereof to such prizes as may be awarded to them. This is the means provided by the law to carry on "business" under the franchise. This may be done, whatever it may mean, without the violation of the statutes against gambling; that is, without keeping a gaming table in the manner

forbidden by the revised code (sec. 3,621.) The scheme of operations set forth in the bill, *is clearly that of keeping or exhibiting "a table for gaming." The legislature did not intend to repeal this section of the code, by the law allowing the formation of this association, and turn loose upon society the evils thus restrained. I therefore concur in the judgment of the majority of the court."*

Peck, C. J., in a separate opinion, holds that the act of 1868, was not of itself a contract, but a proposal which would ripen into a contract when accepted, and payment made of $1,000, as provided in the 2 section. It would then be not a contract for ten years, but only one for one year from the date of payment; and as the association were not bound to pay annually this sum for ten years, but only so long as they might choose to do business, and as it is the essence of a contract that it should be mutual, the State was only bound for one year from each annual payment. "The State chose to withdraw her proposal, and at a time when no contract, in fact, existed, to repeal the act. This she did by the act 3 March, 1871. (Book acts, p. 217.) "The payment subsequent to the repeal was made without authority of law, and did not create any contract binding on the State, or authorize them to exercise the privilege of franchise named in the act, and if in "claiming to do so they violated the laws of the State against gaming, they were liable to be proceeded against and punished, in the same manner as other persons guilty of the same offense," (p. 38–44.)

It thus appears that a majority of the court, *Saffold* and *Peck*, J. J., held the act of 1868, under which the defendant justified, to be unwarranted by the Constitution of the State, and therefore void. X

This decision of the highest court in the State is made

X Saffold & Peck Peters — that the business carried on was gambling and not warranted by the Act.

without any reference to the effect of the repealing act of 1871.

Peters, J., while differing with the other two judges, and holding the act to be constitutional, united with them in opinion that, if the act were valid, "it requires the distribution of prizes to be fairly made, which is not the case in the games called keno and roulette," or, in his own express words, the legislature did not intend to allow such a scheme of operations set out in the Bill, which is clearly that of keeping a gaming table, and thus "turn loose upon society" the evils, restrained by the code against gambling.

It is needless to argue or cite authority to show that such a decision as this, by the Supreme Court of the State, is beyond the revisory power of this tribunal.

If a legislature has the power to grant the privilege of a lottery, such grant may ripen into a contract which would be protected by the Federal Constitution. Against the impairment of its obligation by subsequent legislation, this court would be properly applied to.

But, whether the legislature has such authority, what is the true interpretation of the law passed for the purpose, and what acts would be justified under it, are matters which lie exclusively within the determination of the highest court of the state—whose judgment is final.

Solomons v. Graham, 15 Wall., 210.

In addition to this, it is to be remarked, that the record is wholly silent on the question whether the repealing act of 1871 was in violation of any clause of the Federal Constitution. To give this court revisory jurisdiction, the question as to the Federal Constitution should clearly appear from the record to have been made in the court below, and there passed upon.

The opinions of the judges have heretofore been held to form no part of the record; but whether included or excluded, the record is equally barren of any decision revisable under the 25th section.

ASSIGNMENT OF ERRORS.

That the record does not show that any Federal question was properly presented to the consideration of the court below, and acted on, or that any such question exists in the record of which this court has jurisdiction.

It is therefore submitted that this court must dismiss the writ of error for want of jurisdiction.

P. PHILLIPS,
for Defendant in error.

Supreme Court of the United States.

ANTONIO ARCARDI

vs.

THE STATE OF ALABAMA.

No. 306.

On motion to dismiss Writ of Error, for alleged want of jurisdiction in this Court.

Brief of SAML. F. RICE and JOHN A. ELMORE, for plaintiff in error.

The statement of the case contained in the brief of the counsel for the defendant in error is neither full nor accurate. It omits a material part of the evidence on the trial, which is set forth in the bill of exceptions. It omits to notice the fact that the bill of exceptions sets forth "all the evidence" which was adduced on the trial of the cause. It omits to disclose that the reason why there was no assignment of errors in the Supreme Court of Alabama, was because section 4,314 of the Revised Code of Alabama dispenses with any such assignment, and makes it the duty of that Supreme Court "to render such judgment on the record as the law demands."

The questions involved and the manner in which they were raised cannot well be more succinctly stated than in the record itself. The indictment (p. 4), the bill of exceptions (pp. 9, 10, 11, 12, 13), and the opinion and judgment of the Supreme

Court of Alabama (p. 14), taken in connection with the Act of December 31st, 1868, (Pamph. Acts of 1868 of Alabama, pp. 511 & 512), and the Act of March, 1871, which purports to repeal said Act of December 31st, 1868, comprise a fair statement of the case.

The said Act of March, 1871, was not formally offered in evidence. A formal offer of such an act in evidence is never necessary, though sometimes done out of abundant caution. The reason why such offer is unnecessary is, that the State courts are bound judicially to know, without proof, such an act, whether valid or invalid; and the courts of the United States are also bound to know, judicially, without proof, such an act, whether valid or invalid (1 Brightly's Federal Dig., p. 364, sec. 70–72). The Act of March, 1871, is as much a part of the case as if it had been formally read in evidence. It is mentioned in the bill of exceptions and in the opinion of the State Supreme Court, and is treated in that opinion as a valid act. In that opinion, the advice of the counsel of plaintiff in error *against the validity* of said Act of March, 1871, is pronounced to be "a mere mistake of law." And it is plain that if the State Supreme Court had not held said Act of March, 1871, to be valid, it would have reversed the judgment against plaintiff in error.

It is quite clear from the record that the chief defense and justification against the indictment, which was set up and claimed by the plaintiff in error in each of the State courts, rested upon the said Act of December 31st, 1868, and upon the acceptance of its propositions and provisions by the persons named or described in it, by payment actually made in pursuance of its terms, as early as February, 1869, and in each year thereafter, and upon that clause of paragraph 1 of section 10 of article 1 of the Constitution of the United States, by which "impairing the obligation of contracts" by a State is prohibited, as well as upon that clause of the fifth amendment to that Constitution which protects a person from deprivation of his property without due process of law.

It is also quite clear from the record that he read in evidence on the trial, the said Act of December, 1868, that he proved the several annual payments mentioned in the record,

in compliance with and in acceptance of the propositions and provisions of that act; that he proved that the first of these payments was made February 2d, 1869, and nearly three years before the finding of the indictment (which indictment, being for a misdemeanor, cannot, under section 3,952 of the Revised Code of Alabama, embrace or cover a period longer than one year before the commencement of the prosecution); that he proved that he was the agent and partner of I. C. Moses & Co., the persons mentioned in the said Act of December, 1868; that the acts for which he is indicted were directed and controled by them; that the mode of distributing awards and prizes which he followed in carrying on their business had been selected by them, and prescribed to him by them; that all the acts done by him, which were proved in this case, were done by him "under the rules and regulations prescribed by said I. C. Moses & Co., and claimed to be in pursuance" of said Act of December, 1868; that the table and wheel used as part of the mode of distributing awards and prizes were in some respects like a roulette table and wheel, but in other respects were unlike to and different from such table and wheel, and that the establishment of plaintiff in error, where he carried on the business, was called "The Mobile Charitable Association 31-Ball Lottery," and was public and open in all its operations; and there is no evidence whatever of any unfairness in any part of the business.

On the trial in each of the State courts there was drawn in question the validity of the said Act of March, 1871 (purporting to repeal said Act of December, 1868), or of an authority exercised under the State of Alabama, on the ground of their being repugnant to the Constitution of the United States, and the decision in each of said State courts was in favor of their validity. There was also drawn in question the construction of that clause of paragraph 1 of section 10 of article 1 of the Constitution of the United States which relates to "impairing the obligation of contracts," as well as the construction of the clause of said fifth amendment to that Constitution, which protects a person from deprivation of his property without due process of law, and the decision was against the title, right, privilege or exemption specially set up or claimed by the plain-

tiff in error under such clauses of the Constitution of the United States.

It also appears from the record that in each of said State courts the plaintiff in error claimed a "title, right, privilege or exemption under the Constitution of the United States, or authority exercised under the United States, and that the decision was against the title, right. privilege or exemption specially set up or claimed by the plaintiff in error under such constitution or authority.

It is not possible to examine the record and discover any ground on which the defense, or justification, or title, right, privilege or exemption, set up or claimed by the plaintiff in error as above stated, could have been overruled and denied, but the fact that the Legislature of Alabama passed its said Act of March, 1871, purporting to repeal said Act of December, 31st, 1868; or the fact that said Legislature had, *prior* to 1868, adopted said section 3,621 of the Revised Code of Alabama; or the fact that section 2 of article 4 of the Constitution of Alabama contained a provision in the following words: "Each law shall contain but one subject, which shall be clearly expressed in its title;" or the fact that said State Constitution contained a provision against the creation or grant of "*hereditary*" privileges or distinctions.

It is clear that these four facts, taken either singly or collectively, do not, under "the law of the land," avoid or destroy the defense, or justification, or title, right, privilege or exemption, set up and claimed as aforesaid by the plaintiff in error, and arising out of said act of December, 1868, and the due acceptance of its propositions by actual payment as therein required, and the protection given by the Constitution of the United States, to such contracts and to the persons who assert their claims under such contracts.

The Act of December 31st, 1868, is one of those "laws which amount to *propositions on the part of the State, which, if accepted* by individuals, will become *binding contracts.*" Cooley on Const. Lim., 284; Oliver Lee & Co.'s Bank, 21 New York Rep., 14; The State *v.* Heyward, 3 Rich. (So. Ca.) Law R., 389; Home of the Friendless *v.* Rouse, 8 Wallace, 430; Philadelphia Association *v.* Wood, 39 Penn. State R., 73; Boyd *v.* Jackson, 46 Ala. R., 329; Manaway *v.* The State, 44 Ala. R., 375.

It is undeniable that if the Act of December, 1868, was a valid enactment, it acquired the force and effect of *a contract* as soon as there was a due acceptance of its propositions. It seems impossible to deny or doubt this position.

The validity of that act was steadily maintained by all departments of the government of Alabama up to the day, in March, 1871, on which the said Act of March, 1871, was passed, purporting to repeal the Act of 1868. This pretended repeal occurred more than two years after the due acceptance of the propositions of the Act of 1868, and after two annual payments, of $1,000 each, had been made, and just before the third annual payment was made.

About nine months before this pretented repeal, and at the June Term, 1870, of the Supreme Court of Alabama, the validity, as well as construction, of this Act of 1868, was, for the first time, presented for the decision of that court, in a case of such magnitude as to forbid the supposition that the highest court of the State would decide it without the fullest examination. In that case, a citizen was under indictment for a felony, to wit, forgery of the certificates of subscription mentioned in the Act of 1868. The certificates for forgery of which the accused was indicted, were made and uttered, the indictment found, and the trial had in the court of original jurisdiction sometime *after the due acceptance* of the propositions of the Act of 1868, by the payment, on the 2d day of February, 1869, of the *first* annual installment of $1,000, in compliance with that act. But on the trial, in that case, the State omitted to prove that any payment had been made under that act. By this mere omission, there was in that case no evidence given of any acceptance of the propositions of the Act of 1868 by the persons therein named or described. The accused, however, was found guilty. On the trial he took several exceptions to the rulings of the court of original jurisdiction, and appealed to the State Supreme Court. On that appeal all his exceptions were overruled except one, which is disclosed in the following language of that Supreme Court:

"The *only error* in the record is the failure, on the part of the State, to prove that the company had paid *the* $1,000 required as a condition precedent to their right to set up a lottery. (Acts

1868, p. 511.) Without the performance of *this condition*, the certificates were illegal and not the subjects of forgery."

"The objection does *not apply to the subsequent payments required*." Manaway *vs.* The State, 44 Ala. R., 375.

In that important case, the State Supreme Court unanimously decided, in effect, the following points: 1st. That the said Act of December, 1868, was valid. 2d. That there was *only one* "*condition* precedent" in said act, to wit, the payment of the *first* annual installment of one thousand dollars in pursuance of the act. 3d. That all the subsequent payments were nothing more than *conditions subsequent*. The case was remanded for a new trial, which, of course, was to be governed by the points thus deliberately settled by the highest State court. If the Act of December, 1868, had been invalid for unconstitutionality or other cause, the plain duty of that appellate court was to have quashed the indictment and discharged Manaway from further imprisonment and trial under an indictment based upon a void statute.

The decision thus made in Manaway *v.* The State is as sound a one as was ever made. The Act of December, 1868, contains "but one subject"; that subject is "clearly expressed in its title"; and is the establishment of an association—a *partnership* (by the name of The Mobile Charitable Association), "for the benefit of the common school fund of Mobile county, without distinction of color." The propositions made by the act to establish said partnership association are sweeping and seductive. Yet they are propositions made by the State, through its Legislature, and are such as the State, through its Legislature, had authority to make. Lottery is the most hurtful and pestilential of all kinds of gambling. Phalen *v.* Virginia, 8 Howard. Yet the Legislature of the State may take away all *indictable quality* from every kind of gambling, even from that worst kind called lottery. The Legislature may do this without any valuable consideration paid therefor, by simply repealing all laws and parts of laws which make gambling of all kinds indictable; or, it may do the like thing for a valuable consideration paid as it may direct; certainly, Alabama, through its Legislature, for a valuable consideration to be paid to the common school fund of a specified

county, has authority to enter into a valid contract with specified partners, that they shall have the right for ten years to receive subscriptions and to sell and dispose of certificates of subscription which shall entitle the holders thereof to such prizes as may be awarded to them, which distribution of award shall be fairly made in public, "by casting of lots, or by lot, chance, *or otherwise in such manner as* TO THEM MAY SEEM BEST," &c.

If the act of December, 1868, is valid, it is absurd to contend that its broad language does not confer upon said partners the franchise or privilege to do everything which the plaintiff in error did, and to *select any mode* they deemed best for the distribution of awards and prizes.

The Legislature inserted in the contract it proposed, a provision that "*before commencing* business" under the contract, said partners shall pay, or cause to be paid, to the Board of School Commissioners of Mobile county, for the use of the public schools of said county, the sum of one thousand dollars; and *annually thereafter* a like amount for the term of ten years, or so long *as said partnership shall choose to do business* under the provisions of this act," (contract.)

The only "condition precedent" in the contract proposed by the Legislature is found in that provision. That single condition precedent was the payment of the first $1,000 by said partners "*before commencing* business" under the contract. Without the actual payment of that sum, there could be no contract. Its payment turned what was only a *proposed* contract into an actual and perfect contract. And this payment by said partners out of their own funds, "before commencing business," distinguishes this case from Phalen *v.* Virginia, 8 Howard.

There is neither reason nor authority for asserting that there are ten conditions precedent in this contract, or that each of the subsequent payments required, *after* the first payment had been made, was a condition precedent. By the first payment, the proposal of a contract became a contract, and all the franchises or privileges therein proposed became fully vested in said partners, as their right and property, subject to be divested for sufficient cause; but only in *a direct judicial proceeding*, in

which the partners would be entitled to an opportunity to show why their franchises or privileges should not be divested or declared forfeited.

Even if the partners had failed to make subsequent payments, such failure would have been no more than *cause of forfeiture*, to be enforced, if at all, in a direct judicial proceeding, to which the partners would be necessary parties; and in which they would be entitled to show *a waiver* of prompt payment by the beneficiary, or by the State, or any other sufficient defence. Forfeitures are not favored by law.

Sprowl *v.* Lawrence, 33 Ala. R., 674.

The choice of the partners to *continue business under the contract*, coupled with their failure to make the subsequent payments therein required, would subject them to a recovery in an action of assumpsit or case, by the beneficiary. In such action, the following principle would be decisive against them: Where persons take and enjoy anything which they know to be charged by law with a debt or duty, the natural inference, as well as the legal implication, is, that they mean and assume to pay that debt or to perform that duty. Their liability will be implied or raised by law from such facts.

The validity of the contract is not affected by its securing the option to said partnership only. It is fully settled that "a contract may be optional with one of the parties, in part or in whole, and obligatory on the other. Disbrough *v.* Neilson, 3 Johns. Cases, 81; Giles *v.* Bradley, 2 Johns. Cases, 252, and authorities cited in notes to these cases. Murrell *v.* Whiting, 32 Ala. R., 63.

Conceding that the State constitution prohibits the grant of "hereditary" distinctions or "hereditary" privileges, that concession avails nothing to the defendant in error. For, in the present instance, there is a plain contract between the State and the individual partners mentioned in the act of December 31st, 1868; and this contract is founded upon, and supported by, a moneyed consideration actually paid, and devoted to a "municipal" purpose—education. Evidently the State, through its Legislature, may enter into contracts of this kind.

Boyd and Jackson, 46 Ala. R., 329.

Conceding that the Legislature cannot create a corporation by special act, except for municipal purposes, yet the act of 1868 is for a municipal purpose, and does not create a corporation—it merely secures the enumerated privileges or rights, for the defined period, to the persons therein described, not as corporators, but distinctly as "partners." It does not provide for "*succession.*" The partnership is, in legal contemplation, clearly not a corporation (Parsons on Part'n, 177, 267); and it is the duty of all courts to put that construction on a statute which will make it consistent with the Constitution, rather than a construction which will bring it into conflict with the Constitution, and thus destroy it.

Wammack *vs.* Halloway, 2 Ala. R., 32.
The State *ex rel. vs.* Dawson, 39 Ala., 395-6.
Thompson *vs.* The State, 20 Ala. R., 62.
The Emily and Caroline, 9 Wheaton, 388.

The only remaining pretence for saying that the Act of 1868 is violative of the State Constitution is based upon section 2 of article 4 of that Constitution, which is in the following words, to wit:

"Each law shall contain but one subject, which shall be clearly expressed in its title."

The first construction of this clause of the Constitution was given in the case of Weaver *vs.* Lapsley, 43d Alabama Reports, p. 224. The Supreme Court in that case simply decided that "An act to declare void certain judgments, and to grant new trials in certain cases therein mentioned, and to repeal paragraphs 2,876 and 2,877 of the Revised Code of Alabama," was void because the act contained "two separate and distinct subjects, having no connection with each other."

It was next discussed in Gunter *vs.* Dale County, 44th Alabama Reports, p. 639, where it was *liberally construed.* The court saying, "the law contains but one subject, though it deals with several branches of that subject, but they are all attingent and cognate to one subject matter. * * * *This is a sufficient compliance with the purpose of the funda-*

mental law to rescue it from the vice of unconstitutionality" (p. 646).

In Martin *vs.* Hewitt, 44th Alabama Reports, p. 418, this clause of the Constitution is most liberally construed (pp. 433, 435).

In Farley, Smith & Co. *vs.* Dowe, 44th Alabama Reports, p. 325, the "Act for the relief of laborers and employés" was assailed as unconstitutional. It was urged that no one could tell from the title of the act what was the purpose of the law; that, therefore, the subject was not clearly expressed in the title, and the act according to the train of reasoning in Weaver *vs.* Lapsley, *supra*, was void. This proposition the court *promptly denied.*

In *Ex parte* Upshaw, 44th Alabama Reports, 234, the court say: "The Constitution does not forbid the incorporation into a law of everything needful to the proper operation of the one subject to which it is limited."

In the still later case of *Ex parte* Selma & Gulf Railroad Company, 45 Alabama Reports, p. 773, the doctrine is broadly laid down that "*the General Assembly has the same right to construe the* Constitution of the State that the courts have, and where the question is one in which a liberal construction may be made, the legislative construction will not be condemned, unless it is very clearly wrong." In that case, Weaver *vs.* Lapsley, 43d Alabama Reports, is commented on, and the right of the Legislature to fix a liberal construction fully admitted. Indeed, it is said in that case that "*the Supreme Court* passes beyond the wise limits of its powers when it goes into criticisms (minute) *in order to controvert the Legislative construction.*"

The same clause of the Constitution was again construed in the still later case of Falconer *vs.* Robinson, 46 Alabama Reports, 340. In this case a most latitudinarian construction was given the constitutional provision in question. See the argument for rehearing, which was denied, 46 Alabama Reports, 350.

From these cases, *the only adjudications upon this clause of the Constitution, which became of force in* 1868, it will be seen that the constitutional provision has nowhere been strictly con-

strued, save perhaps in the first case. All the other and later constructions have been liberal, and the right of the Legislature to construe this part of the Constitution for itself *broadly* conceded. See also the dissenting opinion of Justice Peters in the present case.

It will be perceived on examining these cases that the only rule established by the Supreme Court of Alabama is this: If the court deem the law assailed a good law, it will construe this provision of the Constitution liberally; if the court deem the law assailed a bad law, it will construe this provision of the Constitution strictly. In other words, the Supreme Court of Alabama, by its variant and flexible construction of this clause of the Constitution, exercises an illegitimate and irresponsible *veto* power over the Legislature. The Supreme Court of the United States cannot be expected to follow and sustain this whimsical and dangerous *veto* power.

If the act establishing the Mobile Charitable Association is unconstitutional by reason of its subject not being clearly expressed in its title, it is difficult to see by what reasoning the case of *Ex parte* Selma & Gulf Railroad Company (45 Alabama Report, p. 773) and the other decisions referred to, can possibly be sustained.

What is said by the Chief Justice in Martin *vs.* Hewitt, 44 Ala. Rep., on page 433, is sufficient to destroy the pretense of unconstitutionality as grounded on section 2 of article 4 of the State Constitution.

The "oscillation" of the State Supreme Court on the construction of this clause of the Constitution certainly ought to free all other courts from subjugation or blind submission to its views in any particular case.

The truth is prominent that until the Legislature passed its Act of repeal in March, 1871, the Supreme Court of the State maintained the validity of the Act of December 31st, 1868; and that after that so-called repeal, the same Supreme Court (the Hon. Thomas M. Peters dissenting) held the same act invalid. The truth is equally conspicuous that *there is really nothing which can justify this last mentioned decision of the mere majority of the court, unless said repealing act is valid.* And it is undeniable that this repealing act is in conflict with that provision of the

Federal Constitution which protects contracts from impairment by the action of State functionaries. If the Supreme Court of the United States cannot in such cases preserve the obligation of contracts with a State against impairment by any of the departments or functionaries of that State, it seems inevitably to follow that the State by a mere form or device can elude the jurisdiction of the Supreme Court of the United States, and also the substance and spirit of that provision of the supreme law of the land, which was designed to preserve the obligation of all contracts, and especially of all contracts to which the State itself is a party. The former decisions of the Supreme Court of the United States establish the proposition that no State functionaries can thus elude the jurisdiction of the highest court of the Union or the supreme law of the land.

The Bridge Proprietors *vs.* The Hoboken Company, 1 Wallace, 116.
Jefferson Branch Bank *vs.* Skelly, 1 Black, 436.
Furman *vs.* Nichol, 8 Wallace, 44.
Home of the Friendless *vs.* Rouse, 8 Wallace, 430.
Gelpcke *vs.* City of Dubuque, 1 Wallace, 206.
The Ohio Life & Trust Co. *v.* Debolt, 16 Howard, 432.
Delmas *v.* Insurance Company, 14 Wallace, 661.
Pease *v.* Peck, 18 Howard, 599.

Up to the passage of said repealing Act of March, 1871, the partnership having made at least two payments in pursuance of said Act of December, 1868, and having thus unquestionably accepted the propositions contained in this Act of 1868, the *contract*, which became perfect by such acceptance and payment, was expounded and treated as valid by all departments of the State government. For every such case the Supreme Court of the United States has completely settled "the sound and true rule" to be as follows:

"If the contract, when made, was valid by the laws of the State, *as then expounded by all departments of the government and administered in its courts of justice*, its *validity* and *obligation* cannot be impaired by any subsequent legislation *or decision of its courts* altering the *construction of the law*." * * * "The same principle applies where there is a change of judicial decision as to the constitutional power of the Legislature to en-

act the law." * * "To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal." The Ohio Life and Trust Company *v.* Debolt, 16 Howard, 432; Gelpcke *v.* City of Dubuque, 1 Wallace, 206.

The justice of this rule is clearly illustrated in the present case. The identical conduct of the plaintiff in error, for which he is here indicted, occurred *after* the decision in Manaway *v.* The State, and is fairly attributable to it.

The State Supreme Court has never declared its decision in Manaway *v.* The State overruled. It has merely ignored it; and has thus far ignored it only when dealing with the said Act of December, 1868. At its June Term, 1871, it has treated as inoperative the pretended repeal, in 1871, of another act passed in October, 1868, by the same Legislature that passed the Act of December, 1868, in the same year, for similar purposes, and under the same State Constitution. These two acts thus passed in 1868, by the same Legislature, are so much alike in *title, in propositions, and in body* (as well as in the pretended repeal of each of them), that it seems impossible to distinguish the one from the other, in validity, obligation, principle or power. Yet at the June Term, 1871, the same State Supreme Court which has, in the present case, held that the Act of December, 1868, was invalid, and never had the force of a contract, although its propositions were accepted, held that the Act of October, 1868 was valid, and acquired the force and obligation of an irrepealable contract from acceptance of its provisions by payment made in pursuance thereof. Boyd & Jackson *v.* The State, 46 Ala. R., 329.

Special attention is invited to the authorities cited by counsel and court in the last mentioned case. It is respectfully urged that it is legally impossible that one of these acts of 1868 can be authorized by the State Constitution and be valid, if the other be unauthorized by that Constitution and be invalid.

In prosecuting the inquiry whether the obligation of the contract under which plaintiff in error claims has not been impaired contrary to the Constitution of the United States, "This court must decide for itself *whether any valid contract existed*"; and "in making up its judgment *on that question*, is not concluded by the decision of the State court." Delmas *v.* Insurance Company, 14 Wallace, 661.

In the case last cited, this court says: "This is not the class of questions in which we are bound to follow the State courts" * * * "Besides, this court has always jealously asserted the right, when the question before it was the impairing of the obligation of a contract by State legislation, to ascertain for itself whether there was a contract to be impaired. If it were not so, the constitutional provision could always be evaded by the State courts giving such construction to the contract, or such decisions concerning its validity, as to render the power of this court of no avail in upholding it against unconstitutional State legislation." Jefferson Branch Bank *v.* Skelly, 1 Black, 436; Bridge Proprietors *v.* Hoboken Co., 1 Wallace, 145; Hart *v.* White, 13 Wallace, 646.

Any question which, if decided by the State courts in a civil case, would be revisable by the Supreme Court, is, at the instance of the accused, equally revisable when decided by the State court in a criminal case. Twitchell *v.* The Commonwealth, 7 Wallace, 321.

In the present case, the jurisdiction of the Supreme Court of the United States is clear, unless the dangerous concession is now made that State courts, by obscurity or ingenuity, can elude and defeat that jurisdiction; Pennywit *v.* Eaton, 15 Wallace, 380; Railroad *v.* Richmond, 15 Wallace, 3; Insurance Company *v.* The Treasurer, 11 Wallace, 208; Delmas *v.* Ins. Co., 14 *ib.*, 661; Furman *v.* Nichol, 8 *ib.*, 44; Knox *v.* Exchange Bank, 12 *ib.*, 379.

SAMUEL F. RICE,
JOHN A. ELMORE,
Counsel for Plaintiff in Error.

The jurisdiction of this court in such a case as this has been settled for more than forty years.

Davis v Packard 6 Peter 41
Worcester " State of Geo. 6. " 515
Craig " Missouri 4 " 410

Supreme Court of the United States.

DECEMBER TERM, 1872.

J. CLIFTON MOSES and EUGENE BEEBE, Plaintiffs in Error,

vs.

MAYOR, ALDERMEN, AND COMMON COUNCIL OF THE CITY OF MOBILE, Defendants in Error.

ANTONIA ARCARDI, Plaintiff in Error,

vs.

THE STATE OF ALABAMA, Defendant in Error.

ARGUMENT FOR THE PLAINTIFFS IN ERROR.

When there is "oscillation" in the adjudications of the highest court of a State, involving not even more than the construction of a mere statute of the State, the Supreme Court of the United States is under no obligation to follow the decisions of such court, especially when to do so would be to immolate the law, simply because a State tribunal had erected the altar and decreed the sacrifice.

Gelpcke *vs.* City of Dubuque, 1 Wallace, 205.

But in the present cases it is not a mere statute of a State to be construed; that which the defendant in error calls a statute was, from the time when its provisions were accepted, *a contract.*

There are "laws which amount to *propositions on the part*

of the State which, if accepted by individuals, will become binding contracts."

Cooley on Const. Lim., 284.
Oliver Lee & Co.'s Bank, 21 New York Rep., 14.
The State *vs.* Heyward, 3 Rich. (So. Ca.) Law R., 389.
Home of the Friendless *vs.* Rouse, 8 Wallace, 430.
Philadelphia Association, &c., *vs.* Wood, 39th Penn. State Rep., page 73.
Boyd & Jackson *vs.* The State, 46 Ala., 329.

It is precisely that kind of law, or that kind of contract, upon which the plaintiffs in error here stand and claim.

The law here referred to is an act of the General Assembly of Alabama, entitled "An act to establish the Mobile Charitable Association for the benefit of the common school fund of Mobile county, without distinction of color," approved December 31st, 1868, and is found on pages 511 and 512 of the Pamphlet Acts of Alabama of 1868.

The propositions contained in this law were accepted over and over again by the person to whom they were therein made. The first (and essential) acceptance was by the payment in pursuance of that law of the first annual instalment of one thousand dollars, thereby required on the 2d day of February, 1869. The second (and superfluous) acceptance was by the payment in pursuance of that law, of the second annual instalment of one thousand dollars on the 30th day of November, 1869. The third (and superfluous) acceptance was by the payment in substantial pursuance of that law, on the 19th day of April, 1871; the earlier and timely payment of this third instalment having been prevented and restrained by litigation and claims of others without fault on the part of plaintiffs in error, and the beneficiary not only receiving this payment, but thanking the plaintiffs in error for their substantial and *bona fide* compliance with the laws.

This law was, at the June term, 1870, of the supreme court of Alabama, for the first time presented for the solemn judgment of that court in a case where a felony (forgery)

was charged, a case of such magnitude as to forbid the supposition that the highest court of a State would decide it without the fullest examination. In that case the State had omitted to prove that any payment had been made by the persons named in this law, consequently there was, in that case, no evidence of any acceptance of the provisions of the law by the persons named in it.

The supreme court of the State use the following language:

"The *only error* in the record is the failure, on the part of the State, to prove that the company had paid the $1,000 required, as a condition precedent to their right to set up a lottery. (Acts 1868, p. 5.) Without the performance of this condition the certificates were illegal and not the subjects of forgery." (Rev. Code, 3,616.)

"The objection does *not apply to the subsequent payments required.*"

Manaway *vs.* The State, 44 Ala. R., page 375.

In that important case the supreme court of Alabama deliberately and clearly decided the three following points: 1st. That the aforesaid act of December 31st, 1868, was valid; 2d. That there was *only one "condition precedent"* in said act, to wit, the payment of the *first* annual instalment of one thousand dollars; 3d. That all the subsequent instalments were nothing more than conditions subsequent.

No more correct decision was ever made by a court, as is evident from the broad, liberal, and even unguarded words of said act, and all the authorities which bear upon the acceptance of such questions and *seductive propositions.* The law of no civilized country permits a person or State by such *sweeping propositions* to draw citizens into their acceptance, and afterwards, without any restoration of the money thus extracted from them, to impair the force of the plain words by which the money was procured, especially when, as here, the real beneficiary makes no complaint, but is anxious that the entire contract should be performed.

Be it remembered that this sound decision was made at

the June term, 1870, *and before the commencement of the present cases;* and that by this decision it was clearly established that the law or act had the force of a *contract*, if the company had "paid the $1,000 required as a condition precedent to their right to set up a lottery."

The fact of such payment in pursuance of that law was not proved in Manaway *vs.* The State, but was a fact then in existence, and is clearly proved in the present cases. Indeed, not only one, but several of such payments are here clearly proved. Up to the time of that decision, the company having made at least two payments in pursuance of said law, and having thus unquestionably accepted the propositions contained in that law, the *contract* which became perfect by such acceptance and payment was expounded and treated as valid by all departments of the State government.

In every such case the Supreme Court of the United States has fully settled the "sound and true rule" to be as follows: (Wallace, 206.)

"If the contract, when made, was valid by the laws of the State as then expounded by all departments of the Government, and administered in its courts of justice, its *validity* and *obligation* cannot be impaired by any subsequent legislation or *decision of its courts altering the construction* of the law." * * * "The same principle applies where there is a change of judicial decision as to the constitutional power of the Legislature to enact the law." * * "To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."

Gelpcke *vs.* City of Dubuque, 1 Wallace, 206.

The identical conduct of the plaintiffs in error, which is the ground of controversy in the present cases, occurred *after* the decision in Manaway *vs.* The State, and is fairly attributable to that decision.

Yet after that decision has been made in terms, the import of which no intelligent citizen could misunderstand, and on the 8th day of March, 1871, the Legislature assumed

to pass an act purporting to repeal unconditionally the said act of December 31st, 1868, thus repudiating the obligation of the contract arising out of the previous acceptance of the propositions contained in the last-mentioned act.

This pretended repeal was passed after the first two annual instalments had been paid within periods to which the most ingenious critic could invent no objection, and whilst the plaintiffs in error were ready and willing to pay the third instalment and were restrained and prevented by litigation and claims of others from making it.

After this pretended repeal, the Supreme Court of the State seemed determined to put itself in line with the repudiating Legislature, and at the same time to elude the jurisdiction of the Supreme Court of the United States. This is evidenced by the opinion of that court in the present cases, which ignores its former decision in Manaway *vs.* The State, closes its eyes to said *pretended* repealing act, and with an apparent revival of a devotion to the constitution of the State, which seems to have been dead when Manaway *vs.* The State was decided, pronounces the first-above-mentioned act to be unauthorized by the State constitution. As if it were a fact that the State constitution prohibits the Legislature from making a contract of this kind to raise funds for the needed and great purpose of education.

In the meantime, and at its June term, 1871, the same supreme court of the State has solemnly decided that an act very similar in its propositions, passed by the same Legislature at the same session and for similar purposes, acquired the force and obligation of an inviolable *contract* from acceptance of its provisions by payment made in pursuance thereof.

Boyd & Jackson *vs.* The State, 46 Ala. Rep., 329.

The special attention of the Supreme Court of the United States is invited to the authorities cited by counsel and court in the last-mentioned case. It is one of the wonders of the world how the same court can hold, under the same State

constitution, that the act which was under consideration in the case last-above cited, was not only valid, but, upon acceptance of its provisions, became a *contract;* and yet, that the act first above-mentioned was unauthorized by the State constitution and was invalid either as a law or contract.

Conceding that the State constitution prohibits the grant of "hereditary" distinctions or "hereditary" privileges, that concession avails nothing to the defendant in error. For, in the present instance, there is a plain contract between the State and the individual partners mentioned in the act of December 31st, 1868; and this contract is founded upon, and supported by, a moneyed consideration actually paid, and devoted to a "municipal" purpose—education. Evidently the State, through its Legislature, may enter into contracts of this kind.

Conceding that the Legislature cannot create a corporation by special act, except for municipal purposes, yet the act of 1868 is for a municipal purpose, and does not create a corporation—it merely secures the enumerated privileges or rights, for the defined period, to the persons therein described, not as corporators, but distinctly as "partners." It does not provide for "*succession.*" The partnership is, in legal contemplation, clearly not a corporation, (Parsons on Part'n, 177, 267;) and it is the duty of all courts to put that construction on a statute which will make it consistent with the Constitution, rather than a construction which will bring it into conflict with the Constitution, and thus destroy it.

Wammack *vs.* Halloway, 2 Ala. R., 32.
The State *ex rel. vs.* Dawson, 39 Ala., 395-6.
Thompson *vs.* The State, 20 Ala. R., 62.
The Emily and Caroline, 9 Wheaton, 388.

The only remaining pretence for saying that the act of 1868 is violative of the State constitution, is based upon section 2 of article 4 of that constitution, which is in the following words, to wit:

"Each law shall contain but one subject, which shall be clearly expressed in its title."

The first construction of this clause of the Constitution was given in the case of Weaver *vs.* Lapsley, 43d Alabama Reports, p. 224. The Supreme Court in that case simply decided that "An act to declare void certain judgments, and to grant new trials in certain cases therein mentioned, and to repeal paragraphs 2,876 and 2,877 of the Revised Code of Alabama," was void because the act contained "two separate and distinct subjects, having no connection with each other."

It was next discussed in Gunter *vs.* Dale County, 44th Alabama Reports, p. 639, where it was *liberally construed.* The court saying, "the law contains but one subject, though it deals with several branches of that subject, but they are all attingent and cognate to one subject matter. * * * *This is a sufficient compliance with the purpose of the fundamental law to rescue it from the vice of unconstitutionality,*" (p. 646.)

In Martin *vs.* Hewitt, 44th Alabama Reports, p. 418, this clause of the constitution is most liberally construed, (pp. 433, 435.)

In Farley, Smith & Co. *vs.* Dowe, 44th Alabama Reports, p. 325, the "act for the relief of laborers and employees" was assailed as unconstitutional. It was urged that no one could tell from the title of the the act what was the purpose of the law; that, therefore, the subject was not clearly expressed in the title, and the act according to the train of reasoning in Weaver *vs.* Lapsley, *supra*, was void. This proposition the court *promptly denied.*

In *Ex parte* Upshaw, 44th Alabama Reports, 234, the court say: "The constitution does not forbid the incorporation into a law of everything needful to the proper operation of the one subject to which it is limited."

In the still later case of *Ex parte* Selma and Gulf Railroad

Company, 45 Alabama Reports, p. 773, the doctrine is broadly laid down that "*the General Assembly has the same right to construe the* constitution of the State that the courts have, and where the question is one in which a liberal construction may be made, the legislative construction will not be condemned, unless it is very clearly wrong." In that case Weaver *vs.* Lapsley, 43d Alabama Reports, is commented on the right of the legislative to fix a liberal construction fully admitted. Indeed, it is said in that case that "*the Supreme Court* passes beyond the wise limits of its powers when it goes into criticisms (minute) *in order to controvert the legislative construction.*"

The same clause of the constitution was again construed in the still later cases of Falconer *vs.* Robinson, 46 Alabama Reports, 340. In this case a most latitudinarian construction was given the constitutional provision in question. See the argument for rehearing which was denied, 46 Alabama Reports, 350.

From these cases, *the only adjudications upon this clause of the constitution, which became of force in* 1868, it will be seen that the constitutional provision has no where been strictly construed, save perhaps in the first case. All the other and later constructions have been liberal, and the right of the Legislature to construe this part of the constitution for itself, *broadly* conceded. See also the dissenting opinion of Justice Peters in the present case.

It will be perceived on examining these cases that the only rule established by the supreme court of Alabama, is this: If the court deem the law assailed a good law, it will construe this provision of the constitution liberally; if the court deem the law assailed a bad law, it will construe this provision of the constitution strictly. In other words, the supreme court of Alabama, by its variant and flexible construction of this clause of the constitution, exercises an illegitimate and irresponsible *veto* power over the Legislature. The Supreme Court of the United States cannot be expected to follow and sustain this whimsical and dangerous *veto* power.

If the act establishing the Mobile Charitable Association is unconstitutional by reason of its subject not being clearly expressed in its title, it is difficult to see by what reasoning the case of *exparte* Selma and Gulf Railroad Company (45 Alabama Reports, p. 773) and the other decisions referred to, can possibly be sustained.

What is said by the Chief Justice in Martin *vs.* Hewitt, 44 Ala. Rep., on page 433, is sufficient to destroy the pretence of unconstitutionality as grounded on section 2 of article 4 of the State constitution.

The "oscillation" of the State supreme court on the construction of this clause of the constitution certainly ought to free all other courts from subjugation or blind submission to its views in any particular case.

The truth is prominent that until the Legislature passed its act of repeal in March, 1871, the supreme court of the State maintained the validity of the act of December 31st, 1868; and that after that so-called repeal, the same supreme court (the Hon. Thomas M. Peters dissenting) held the same act invalid. The truth is equally conspicuous that there is really nothing which can justify this last-mentioned decision of the mere majority of the court, unless said repealing act is valid. And it is undeniable that this repealing act is in conflict with that provision of the Federal Constitution, which protects contracts from impairment by the action of State functionaries. If the Supreme Court of the United States cannot in such cases preserve the obligation of contracts with a State against impairment by any of the departments or functionaries of that State, it seems inevitably to follow that the State by a mere form or device can elude the jurisdiction of the Supreme Court of the United States, and also the substance and spirit of that provision of the supreme law of the land, which was designed to preserve the obligation of all contracts, and especially of all contracts to which the State itself is a party. The former decisions of the Supreme Court of the United States establish the proposition

that no State functionaries can thus elude the jurisdiction of the highest court of the Union, or the supreme law of the land.

The Bridge Proprietors *vs.* The Hoboken Company, 1 Wallace, 116.
Jefferson Branch Bank *vs.* Skelly, 1 Black, 436.
Furman *vs.* Nichol, 8 Wallace, 44.
Home of the Friendless *vs.* Rouse, 8 Wallace, 430.
Gelpcke *vs.* City of Dubuque, 1 Wallace, 206.

The first payment (in February, 1869,) was clearly in time, and was an acceptance of the propositions of the act of December, 1868. The act did not reserve to the Legislature any power to repeal the act, or to impair any right acquired under it, or to declare or adjudge a forfeiture. Forfeitures are not favored. Even if any subsequent payment was not made in strict time, it was nothing more than *a cause of forfeiture* and could be enforced only in a direct judicial proceeding instituted for that purpose. The Legislature could not, for such cause, declare a forfeiture or deny the persons who had made the first payment the opportunity to show cause why a forfeiture should not be adjudged. The repealing act is such denial, and is the plain assumption of judicial power forbidden to the Legislature.

If any opportunity to show cause had been allowed, the persons who had paid their money under the act of December, 1868, could have obtained the benefit of the settled principles, that when conditions are subsequent and are substantially performed, if it answer the purpose as well, and if no injury can result from it, they are held to be well performed. And they could also have had the benefit of the *waiver* of the beneficiary, evidenced by the acceptance of the third and subsequent payments by that beneficiary.

Any question which, if decided by the State court in a civil case, would be revisable by the Supreme Court of the

United States, is revisable equally when decided in a criminal case.

Twitchell *vs.* The Commonwealth, 7 Wallace, 321.

The court of chancery ought always to protect by injunction, privileges, or franchises conferred by statute, when their exercise is interfered with and threatened with continued interference.

Mayor *vs.* Rodgers, 10th Ala. Rep., 37, and cases there cited.

The injunction in such case is special, and indeed is the whole case. The supreme court of the State having dissolved the injunction and decided that no injunction shall be allowed, its judgment or decree is final in any case of this kind, where the special injunction is the only relief that is asked or that can be granted.

McBrayer *vs.* Hardin, 7 Iredell's Equity Rep., 1.
Purnell *vs.* Daniels, 8 Iredell's Equity Rep., 9.
Poor *vs.* Carleton, 3d Sumner's Reps., 70.
Maxwell *vs.* Ward, 11th Price's Rep., 17.

The judgment dissolving the injunction is final for purposes of an appeal.

Thomson *vs.* Dean, 7 Wallace, 342; 6 Howard, 204.

In each of these cases the jurisdiction of the Supreme Court of the United States is clear, unless the dangerous admission is made that State courts by device or ingenuity can elude and defeat that jurisdiction.

JOHN A. ELMORE & SAM'L F. RICE,
Attorneys for Plaintiffs in Error.

In the Supreme Court of the United States.

ANTONIO AICARDI,

vs. No. 306.

THE STATE OF ALABAMA.

BRIEF OF SAMUEL F. RICE, AND JOHN A. ELMORE,

For Plaintiff in Error, containing Assignment of Errors.

BARRETT & BROWN, PRINTERS.

In the Supreme Court of the United States.

ANTONIO AICARDI,

vs. } No. 306.

THE STATE OF ALABAMA.

BRIEF OF SAMUEL F. RICE, AND JOHN A. ELMORE,

For Plaintiff in Error, containing Assignment of Errors.

Statement of Facts.

Antonio Aicardi was indicted in the Criminal Court of the county of Dallas, and State of Alabama, in December, 1871, under section 3621 of the Revised Code of Alabama, enacted and in force before the year 1868, and which is in the following words: "Any person who keeps or exhibits, or is interested or concerned in keeping or exhibiting, any table for "gaming of whatsoever name, kind, or description, not regularly licensed under the laws of the State, must, on conviction, be fined not less than one hundred, nor more than one "thousand dollars," &c., &c.

The cause was removed to the Circuit Court of Lowndes county in said State, and there tried, and Aicardi was convicted and fined five hundred dollars, for which judgment was rendered against him.

The evidence on the trial will be found on pages 9, 10 and 11 of the Record, and was as follows:

"Within twelve months before the finding of this indictment in the city of Selma, in the county of Dallas, in said "State, the defendant did keep, exhibit, and was interested in "keeping and exhibiting a table similar in many respects to a "table commonly known and called a roulette table, at which

"money was bet by persons operating at said table; that the "money was bet in this manner, viz: The person who wished "to bet on said table, would pass to the game-keeper money, "for which he would receive in return checks of bone or ivory, "of the same kind used in betting at the game of faro; that "then the checks would represent and stand for money, and "when handed in to the game-keeper by the player, would be "redeemed in money at the value at which they were passed "out by the game-keeper; that the betting was carried on in "this wise: A large table was placed or kept in front of the "game-keeper, upon which was a piece of oil cloth, upon which "was painted or printed certain numbers, from one to thirty-"one, also columns in which said numbers were painted or "printed, said *numbers* [columns] were in alternate colors of "black and red below the green column hereafter described. "On this table was a wheel, the same as used in the game "known as roulette. On this wheel were painted colors and "numbers exactly corresponding with the numbers and colors "on the oil-cloth. A ball or marble was placed in this wheel, "and the wheel was started by the game-keeper to revolve on "its pivot, and the ball or marble was started at the same time. "The bet was determined when the wheel stopped, and the "ball falls into some one of the numbers, and in one of the col-"umns of the red or black. If the ball falls on a color bet on, "the player wins; if not, the game-keeper wins. If the ball "falls on a single number bet on, the player wins 27 for one "bet, or in the checks used as a substitute for money. There "is above these columns of red and black a green-colored col-"umn, in which are painted the numbers 31, 30, & 29. The "only difference between this wheel and a roulette wheel is "that on the roulette wheel, instead of No. 31, there is an O "in place of 30, a picture of an eagle bird, and in place of No. "29 is OO. That in this manner persons were betting at said "table in the city of Selma, and won and lost money at the "same, within twelve months before the finding of this indict-"ment.

"The defendant proved that, in the exhibition and carrying "on said table and business, proved by the State, he was act-"ing as the agent and partner of I. C. Moses & Co., and in no

"other way; that the game or lottery was exhibited openly and "persons publicly invited to participate therein; that it was "announced on and in the building in which this business was "carried on, that it was done under the authority of an act of "the Legislature of Alabama, passed and approved the 31st "of December, 1368, entitled 'An act to establish the Mobile "Charitable Association, for the benefit of the common-school "fund of Mobile county, without distinction of color,' found on "pages 511 and 512 of the pamphlet acts of 1868. This act "was read in evidence. It was further, by the State, admitted "as facts that the said I. C. Moses & Co., on the 2d day of "February, 1869, paid to the board of school commissioners of "Mobile county, the sum of one thousand dollars, under and "in pursuance of said act of the general assembly of Alabama; "that, a short time before, February 2d, 1870, the said I. C. "Moses & Co. paid another sum of one thousand dollars to "said board of school commissioners, under and in pursuance "of said act of the general assembly; and that, in the forepart "of the year 1871, the said I. C. Moses & Co. paid another "sum of one thousand dollars to said board of school commis-"sioners, under and in pursuance of said act of the general "assembly; that, on the 30th of January, 1872, the said I. C. "Moses & Co. paid to said board of school commissioners ano-"ther sum of one thousand dollars, under and in pursuance of "said act of the general assembly. It was further proven that "the acts of the defendant, Aicardi, in exhibiting said table on "which the State sought a conviction, were directed and con-"trolled by the said I. C. Moses & Co., and that the mode of "distributing awards and prizes, as before stated, under the "said act of the general assembly had been prescribed to the "defendant, Aicardi, by said I. C. Moses & Co., and that said "Aicardi was their agent and partner in carrying on said busi-"ness in the city of Selma; and that the acts proven by the "State were done by said Aicardi under the rules and regula-"tions prescribed by said I. C. Moses & Co., and claimed to "be in pursuance of the act of the general assembly before "named, and not otherwise. It was also proven that the es-"tablishment of the defendant, at which his said business was "carried on, was called the Mobile Charitable Association 31-

"Ball Lottery; and that certificates of subscription were given "to the persons who operated or bet at said table, and that "these certificates of subscription were exchanged with the "keeper of the table for the checks described in the foregoing "evidence before the persons who had subscribed and ob-"tained said certificates of subscription, procured the said "checks and commenced their operations or betting. It was "further proved that this exchange of certificates of sub-"scription was at the option or request of the person or per-"sons who held such certificates, and that if the persons hold-"ing such certificates did not request checks, they had the "privilege of putting the certificates themselves down on any "column or number, so as to determine their chances for pro-"curing awards and prizes, and that this mode of determining "and distributing awards and prizes was selected by said I. "C. Moses & Co., and followed by defendant, under their di-"rection. The defendant proposed to prove that he, after the "passage of the act of the 18th of March, 1871, repealing the "act of December 31, 1868, consulted his attorneys, Samuel "F. Rice and John A. Elmore, as to the effect of the said re-"pealing act of 18th of March, 1871, and whether it was not "unconstitutional, and whether it did legally repeal the act of "31st December, 1868, and whether said I. C. Moses & Co. "could legally carry on their business under the said act of "December 31, 1868, notwithstanding the said act of March "18, 1871, and that said attorneys advised the said I. C. "Moses & Co. and the defendant, that the said act of March "18, 1871, was unconstitutional and void, and did not legally "repeal the act of 31st of December, 1868, and that the play-"ing or betting testified to by the witnesses for the State was "done after such advice to said I. C. Moses & Co. and de-"fendant. The State objected to this evidence, and the court "sustained said objection, and refused to permit the defend-"ant to make such proof or any part thereof; and to this ac-"tion of the court the defendant excepted."

The act of December 31st, 1868, referred to in the bill of exceptions is as follows:

No. 169. AN ACT

To establish the Mobile Charitable Association for the benefit of the Common School Fund of Mobile county, without distinction of color.

SECTION 1. *Be it enacted by the General Assembly of Alabama*, That I. Clifton Moses and Fred. H. Fowler, of Mobile, Alabama, and Eugene Beebe, of Montgomery, Alabama, and their associates *as partners*, shall have the full right and authority to form themselves into *a partnership association*, to be known under the firm name and style of "I. C. Moses & Co.," or such other name as they may designate, for the purpose of receiving subscriptions and to sell and dispose of certificates of subscription which shall entitle the holder thereof to such prizes as may be awarded to them, which distribution of award shall be fairly made in public, by *casting of lots, or by lot, chance, or OTHERWISE, in such manner as to them may seem best* to promote the interest of the school fund of Mobile county, which said distribution of award and prizes shall be made at their office in the city of Mobile or such other place or places in the State as they may direct.

SEC. 2. *Be it further enacted*, That *before commencing* business under the provisions of this act, said *partners* shall pay, or cause to be paid, to the Board of School Commissioners of Mobile county, for the use of the public schools of said county, the sum of one thousand dollars; and *annually thereafter* a like amount, for the term of ten years, or so long *as said partnership shall choose* to do business under the provisions of this act. It being understood and agreed, that said payment of one thousand dollars per annum by said partnership to said common school fund is the consideration upon which this privilege is granted; and whenever said company shall fail to pay said sum according to the provisions of this act, then, and in that case, the right to do business shall cease.

SEC. 3. *Be it further enacted*, That during the time business shall be done under the provisions of this act, the same shall be exempt from taxation except for State purposes.

SEC. 4. *Be it further enacted*, That this act shall remain in full force and effect for ten years, upon the consideration

herein contained, *during which time said partnership company shall have the right to exercise the privilege and franchise herein given*, ANY LAW TO THE CONTRARY NOTWITHSTANDING.

Approved December 31, 1868.

The act of March 8th, 1871, referred to in the bill of exceptions, is as follows:

P. 217—1870-1. AN ACT

To repeal an act entitled "An Act to establish the Mobile Chari-
"table Asseciation for the benefit of the common school fund of
"Mobile county, without distinction of color."

SECTION 1. *Be it enacted by the General Assembly of Alabama*, That an act entitled "an act to establish the Mobile Charita-"ble Association for the benefit of the common school fund "of Mobile county, without distinction of color," approved December 31, 1868, be and the same is hereby repealed.

Approved March 8th, 1871.

It will be noticed that the transcript of the record as printed, speaks of this act as of the 18th of March, 1871. This is a mistake, and we have corrected it above in the statement of facts. This court will take judicial notice of such legislative acts.

Cheever v. Wilson, 9 Wallace 121, and foot note thereon.

The foregoing was all the evidence in the case.

The refusal by said circuit court to admit the evidence proposed to be introduced by the plaintiff in error, Aicardi, and the charges given and refused as shown in the bill of exceptions, (and which are hereinafter set forth in the assignment of errors,) are the errors complained of; and the plaintiff in error makes the following

ASSIGNMENTS OF ERROR:

1. The said circuit court refused to permit the plaintiff in error, Aicardi, to prove "that he, after the passage of the act "of the 8th of March, 1871, repealing the act of December "31st, 1868, consulted his attorneys, Samuel F. Rice and "John A. Elmore, as to the effect of the said repealing act of

"8th of March, 1871, and whether it was not unconstitution-
"al, and whether it did legally repeal the act of 31st Decem-
"ber, 1868, and whether I. C. Moses & Co. could legally car-
"ry on their business under the said act of December 31st,
"1868, notwithstanding the said act of March 18th, 1871, and
"that said attorneys advised the said I. C. Moses & Co. and
"the defendant, that the said act of Marth 8th, 1871, was
"unconstitutional and void, and did not legally repeal the
"act of 31st of December, 1868, and that the playing or bet-
"ting testified to by the witnesses for the State, was done af-
"ter such advice to said I. C. Moses and defendant." To which refusal of said circuit court the plaintiff in error excepted. See page 11 of record. And said plaintiff in error now here assigns for error, that the supreme court of Alabama erred in affirming said ruling of said circuit court in refusing to admit the said evidence.

2. The said circuit court gave to the jury the following charge:

"That if the table exhibited by the defendant as shown in
"the proof, was a table commonly used as a gaming table of
"any kind—you need not give it a name—it is sufficient to
"authorize a conviction in this case."

To which charge the plaintiff in error excepted. See page 11 of Record.

And the said plaintiff in error now in this court, assigns for error that the supreme court of Alabama erred in sustaining and affirming the said charge of said circuit court, and in affirming the judgment of said circuit court.

3. The said circuit court refused to give to the jury the following charge asked by the plaintiff in error:

"If the said I. C. Moses & Co., mentioned in the act of the
"Legislature of December 31, 1868, to establish the Mobile
"Charitable Association, read in evidence, on the 2d day of
"February, 1869, paid to the Secretary of the Board of
"School Commissioners of Mobile county, one thousand dol-
"lars under and in pursuance of said act of the Legislature,
"and as an acceptance by them of the terms and provisions
"of said act of the Legislature; if said Board ratified and
"approved said payment, and had the benefit thereof for the

"use of the common schools of Mobile county, then such ac-
"ceptance and payment and ratification gave to said act of
"the Legislature the effect and force of a valid and binding
"contract; and if all the evidence is believed by the jury, no
"act of the Legislature, passed after such acceptance and
"payment, purporting to repeal said first above mentioned
"act, is constitutional or valid, but is void and of no force."

See Exhibit D., page 12 of Record, which refusal of the said circuit court was excepted to by the plaintiff in error.

And the said plaintiff in error now here assigns for error, that the supreme court of Alabama erred in affirming said refusal of said circuit court to give the charge last aforesaid, and in affirming the judgment rendered by said circuit court.

4. The said circuit court refused to give to the jury the following charge asked by the plaintiff in error:

"That if I. C. Moses & Co., under the act of the Legisla-
"ture of the 31st of December, 1868, paid to the Board of
"School Commissioners of Mobile county, one thousand dol-
"lars on the 2d day of February, 1869, and also paid to said
"Board before February, 1870, another thousand dollars, and
"on the 19th of April, 1871, paid said Board another thou-
"sand dollars, all said payments being made by virtue of the
"provisions of said act; and if the said I. C. Moses & Co. in
"good faith adopted the mode described by the witnesses as
"the mode by which prizes should be awarded to the pur-
"chasers of certificates, and such mode of awarding prizes
"was by lot or chance, and the defendant was a partner and
"agent of I. C. Moses & Co., carrying on said business as
"aforesaid in good faith, and this indictment is for so carry-
"ing on said business, then the defendant can not be con-
"victed."

See charge marked "4th," on page 12 of Record, to which refusal of the circuit court the defendant excepted.

And the said plaintiff in error now here assigns for error, that the supreme court of Alabama erred in affirming said refusal to give the said last mentioned charge, and in affirming the judgment of the said circuit court.

5. The said circuit court refused to give the following charge asked by the plaintiff in error:

"That under the act of the Legislature, passed on the 31st "of December, 1868, and found on pages 511 and 512 of the "acts of 1868–9, the parties named therein, I. C. Moses & "Co., their associates and agents, after paying the money "therein required to be paid by them, were authorized to car-"ry on their business at any place or places within this State, "and that the award of prizes therein named could be legally "distributed by casting of lots, by lot, chance or otherwise, in "such manner as they, the said I. C. Moses & Co., might "think proper and best to promote the interest of the school "fund of Mobile county, and that under said act the said I. "C. Moses & Co. were not confined to a lottery in their dis-"tribution of prizes to be awarded, in said act of the Legis-"lature."

See Exhibit F., on pages 12 and 13 of Record, to which refusal the plaintiff in error excepted; and the said plaintiff in error now here assigns for error that the supreme court of Alabama erred in affirming the refusal of said circuit court to give the last mentioned charge and in affirming the judgment of said circuit court.

6. The supreme court of Alabama erred in deciding against the right claimed by the plaintiff in error under that provision of the constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts.

7. The supreme court of Alabama erred in deciding against the right and defence set up and proved by the plaintiff in error on his trial in said circuit court, which defence was founded upon the due acceptance of the provisions of said act of the General Assembly of Alabama of December 31st, 1868, by the partners and their associates referred to in said act, of whom plaintiff in error was one as well as agent, and upon the contract formed by such acceptance, and upon that provision of the constitution of the United States which prohibits a State from passing any law impairing the obligation of contracts.

8. The supreme court of Alabama erred in making a de-

cision and rendering a judgment upon the record, which, upon that record, are contrary to the constitution of the United States and to the supreme law as settled by the decisions of the supreme court of the United States, and to the right of the plaintiff in error.

Each of the charges which the circuit court refused to give was in writing, see bottom of page 11 of record, and were each asked separately, and to each refusal of the court to give each one as asked the defendant excepted.

See page 13 of record.

There was no assignment of errors on the reco.d in the supreme court of Alabama because section 4314 of the revised code of Alabama dispenses with any such assignment in criminal cases, and provides that "in all cases taken to the "supreme court under the provisions of this chapter (chapter "12, title 3, part 4) no assignment of erro s nor joinder in "error, is necessary, but the court must render such judgment "on the record as the law demands."

ARGUMENT.

The argument for plaintiff in error, filed and submitted on the motion to dismiss the writ of error for want of jurisdiction, is herewith submitted as part of the present argument. The authorities therein cited are deemed conclusive in favor of plaintiff in error; and therefore it is proposed now simply to call the special attention of this court to some of the positions which are believed to be controlling in this cause, and to add to the citations heretofore made.

It is clear from the Record, that the Supreme Court of Alabama could not legitimately have rendered the judgment here complained of, without deciding against a right which the plaintiff in error claimed under the Constitution of the United States.

Green v. Van Buskirk, 7 Wallace, 145.

Worcester v. The State of Georgia, 6 Peters, 515.

Davis v. Packard, 6 Peters, 41.

The right thus claimed by plaintiff in error, is founded upon and derived from a contract, to which the State of Alabama

is a party, and the obligation of which is protected by the Federal Constitution.

That contract consists of the act of the Legislature of Alabama of December 31st, 1868, hereinabove set forth, and the due and timely acceptance of the provisions of that act by the persons therein described.

Obviously, if that act was valid, the acceptance of its provisions by the persons therein described, formed a binding contract.

Cooley on Const. Lim. 284.

The first (and only essential) acceptance of the provisions of that act occurred in February, 1869; and is proved by the payment of the required annual sum of one thousand dollars, which was duly made in that month.

At the June Term, 1870, of the supreme court of Alabama, the question of the validity of that act and of the effect of such payment under it, was, for the first time, presented to that court, and in most impressive form. A citizen was indicted for felony; that is, for forging a certificate, purporting to be one issued by the partnership association mentioned in that act. He was convicted, and appealed to that court. The validity of that act was maintained by all the judges; and they all held, that the *only condition precedent* in the act, was the payment of the annual sum of one thousand dollars; which payment was proved, in the present case, to have been made in February, 1869, but of which there was an omission to adduce any evidence in the felony case.

Manaway v. The State, 44 Ala. Rep. 375.

That decision was made in a case, in which section 4314 of the revised code of Alabama provides that "no assignment of errors nor joinder in errors, is necessary; but the court must render such judment on the Record as the law demands."

Williams v. The State, 47 Ala. Rep. 664, 665.

By the passage and approval of the act of December 31st, 1868, the legislative and executive departments of the State government asserted the validity of the act. By the decision

in Manaway v. The State, 44 Ala. Rep. 375, the judicial department of the State government deliberately held that act valid, and remanded that case in order that the act might be enforced as an act in full operation, *provided only* it should, on the new trial, be proved "that the company had paid the $1,000 required as a condition precedent to their right."

The act, as well as the contract formed by its due acceptance, was valid by the constitution and laws of the State, as expounded "by all departments of the government and administered in its courts of justice when the contract was made and long afterwards." The obligation of that contract "can not be impaired by any subsequent legislation, or decision of its courts altering the construction" of the law or constitution of the State.

Gelpcke v. City of Dubuque, 1 Wallace, 206.

Thompson v. Lee County, 3 Wallace, 327 (2d head note.)

The Ohio Life and Trust Company v. Debolt, 16 Howard, 432.

This deliberate decision of the validity of the act, in Manaway v. The State, was made more than a year before the indictment in the present case was found, and was made before the occurrence of any thing which could be relied on for conviction under this indictment. The indictment is for a misdemeanor only, and embraces only acts done within twelve months next before it was found.

Revised Code of Alabama, sections 3541, 3542, 3952.

There was no change of judicial decision as to the validity of the act, *until after the indictment had been found.* That change was made by a divided court. The pretended repeal in March, 1871, of the act, or in other words of the contract, (for the act of December, 1868, had become *a contract* as early as February, 1869,) occurred before the change of judicial decision, and doubtless had influence in causing that change. That pretended repeal occurred within much less than twelve months before finding of the indictment, and was doubtless the cause of the conviction of plaintiff in error.

In the former brief of plaintiff in error, it is shown that

there is no just ground for holding that the act of December, 1868, was in violation of the State constitution and that it, therefore, never had the force of either law or contract.

The act was simply an act to establish a company, a partnership association, for the purpose of encouraging learning in Mobile county. This subject or object is clearly indicated in its title And it seems almost impossible really to doubt as to the power of the Alabama Legislature to pass such an act.

Washington University v. Rouse, 8 Wallace, 439.
Home of the Friendless v. Rouse, 8 Wallace, 430.

"To establish a company" for carrying on any business, "means complete *and permanent* provision for carrying on that business;" and "may well include its continued as well as its first or original operation."

Davidson v. Lanier, 4 Wallace, 455.

In establishing this partnership association, the Legislature did not confine it to a mere lottery; but permitted it to distribute its awards and prizes by lot, chance, or *otherwise* in such manner as *the associates might deem best* for the school purpose. Every word must be allowed some meaning or effect. And as there is no ambiguity in the language, and the intention clearly appears from it, to give the partners *the right of selecting* the manner for distributing awards and prizes, "it is as much the duty of the court to uphold and sustain it, as if it were a contract between private persons."

Home of the Friendless v. Rouse, 8 Wallace, 437.

This act of December, 1868, from the time of its acceptance, operated, so far as this company was concerned, as a repeal of all the criminal law of the State, "which stands in the way of the legal exercise of its legitimate powers;" it operated "as *a proviso* to the statute" which made the exhibition by this company, or its agents, of a gaming table, or any thing of a like kind, indictable, and excepted this company and its agents from all such criminal laws.

Broadbent v. Tuskaloosa Scientific and Art Association, 45 Ala. R. 173, 175.

State courts are not permitted to evade or elude the jurisdiction of this court, either by deciding that to be no contract which this court knows to be a contract, or by any other mistake or device. This court decides for itself whether there was a contract to be impaired, what are its terms, and what its obligations, even though the contract be a legislative contract, or one which arises from the acceptance of the provisions of an act of a State Legislature.

Delmas v. Insurance Co., 14 Wallace, 661.

Olcott v. The Supervisors, 16 Wallace, 678.

The same Legislature which passed the act of December 31st, 1868, at the same session, and on the 10th day of October, 1868, passed another act of a similar kind in its title, object and nature, which is found on pages 263 and 264 of the Pamphlet Acts of Alabama of 1868, and is entitled "An act to establish a Mutual Aid Association, and to raise funds for the common school system of Alabama." The succeeding Legislature, on the 8th day of March, 1871, unconditionally repealed both of said acts.—(Pamp. Acts of Ala., of 1870–81, page 217.) *After these repealing acts*, the validity of the repeal of said act of October 10, 1868, as well as the validity of said act of October 10, 1868, was presented for decision to the Supreme Court of Alabama; and that court held the act of October 18, 1868, valid, and the repeal thereof void.

Boyd & Jackson v. The State, 46 Ala. R. 329.

In the case last cited, decided at June term, 1871, the State court held the acceptance of the provisions of the act of October 10, 1868, to constitute a contract, which the Legislature could not repeal. *How* the acceptance of the provisions of that act could create a contract, and yet the acceptance of the provisions of the like act of December 31st, 1868, could never have the force of a contract, is a puzzle which the Supreme Court of Alabama has not yet solved!

Sam'l F. Rice
Jno. A. Elmore
Jos. Hoffman